



## COUNTY SANITATION DISTRICTS OF LOS ANGELES COUNTY

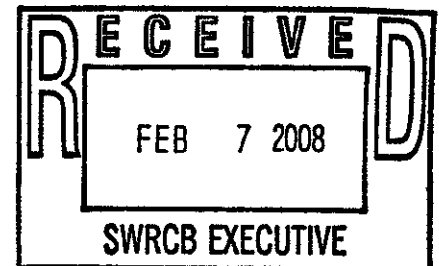
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STEPHEN R. MAGUIN  
Chief Engineer and General Manager

February 7, 2008

Via Electronic Mail and Hand Delivery

Tam Doduc, Chair, and Members  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814  
ATTN: Jeanine Townsend, Clerk to the Board



Dear Chair Doduc and Members:

**Comments on Proposed Water Quality Enforcement Policy  
(January 8, 2008 Version)**

The County Sanitation Districts of Los Angeles County (Districts) are pleased to have the opportunity to provide comments to the State Water Resources Control Board (State Water Board) on the draft revisions to the Water Quality Enforcement Policy (Draft Policy). By way of background, the Districts are a confederation of 24 individual special districts serving the wastewater and solid waste management needs of over 5 million people in 78 cities and unincorporated areas of Los Angeles County. The Districts own and operate 11 wastewater treatment facilities with a combined capacity of approximately 625 million gallons per day. Of these facilities, 9 are located in the Los Angeles region, and 2 are located in the Lahontan region.

In general, the Districts agree with many of the policy principles espoused in the Draft Policy, including the need for fair, firm and consistent enforcement efforts, and the use of progressive enforcement, with efforts generally starting as informal actions that assist cooperative dischargers in achieving compliance and then, as necessary, move toward formal enforcement actions. The Districts also support the goals of the Draft Policy: to create a framework for identifying and investigating instances of noncompliance, for taking enforcement actions that are appropriate in relation to the nature and severity of the violation, and for prioritizing enforcement resources to achieve maximum environmental benefits. To this end, we believe that the proposed classification system provides a clearer approach for identifying priorities than the existing Policy. In particular, we agree that the Draft Policy places an appropriate level of emphasis on formal enforcement efforts (Class I Priority Violations) by focusing on violations that pose immediate and substantial threats to water quality and have the potential to cause significant detrimental impacts to human health or the environment, and on intentional or knowing violations.

Major Comments

The Districts have identified several areas of concern with the Draft Policy. These include provisions relating to Supplemental Environmental Projects (SEPs) and descriptions of several of the

factors related to monetary assessments in Administrative Civil Liabilities (ACL), such as the requirement to establish minimum ACL amounts at the economic benefit and the method of determining economic benefit for public agencies. The Districts are also concerned about how chronic toxicity limits in permits will be evaluated for enforcement purposes (i.e. using the new violation prioritization system), and comments about this area are included below as well.

#### 1. Proposed Supplemental Environmental Project Provisions (Section IX)

While many aspects of the Draft Policy would be improved by the proposed changes, the draft provisions regarding the performance of Supplemental Environmental Projects (SEPs) in the context of monetary assessments imposed in an ACL are very problematic. As acknowledged in the Draft Policy, SEPs are an important tool for encouraging settlement of enforcement actions. What the new SEP provisions in the Draft Policy do not adequately recognize is the value that SEPs play in restoring and protecting the environment within local communities and watersheds. Further, SEPs are especially important to, and appropriate for, use as part of assessments against public agencies. Public agency permittees are fundamentally different from private sector permittees, in that their mission, like that of the Water Boards, is to serve the public interest. Because all penalty payments by public agencies are made with public money, it is most appropriate for those funds to be used directly for useful projects that are of benefit to the local environment. If adopted as proposed, the Draft Policy will have a chilling effect on the use of SEPs, and will preclude numerous beneficial projects and discourage settlement. This will result in many more enforcement actions going to formal hearing before the Regional Water Boards, being petitioned to the State Water Board, and eventually being appealed in court. Our detailed comments on the SEP provisions are as follows.

##### *Part A.7. SEP Credit Relative to Penalty Amount*

Section IX, Part A.7 of the Draft Policy states that SEPs should generally not exceed 25% of the total monetary assessment. SEPs typically arise as the result of a negotiated settlement agreement between a permittee and the Regional Board. The ability to apply a large proportion of the settlement amount toward a SEP supported by the public agency permittee and the Regional Board is an extremely powerful incentive to the permittee to settle and thus avoid protracted administrative proceedings and litigation. The SEPs also usually involve local projects that make them more attractive to the public agency permittee than paying a fine to a state-wide fund without having any input as to how the monies collected are allocated. Without the incentive of allowing a significant portion of the monetary assessment to be applied to a SEP, permittees who judge a proposed monetary assessment to be excessive are far more likely to resist settlement, appeal to the State Water Board, and potentially litigate, thus greatly increasing the amount of state (and local) agency resources required for a single enforcement matter. Since many of the permittees who engage in SEPs are public agencies, litigation would involve two public agencies (the permittee and the Regional Board) solving their dispute in court at substantial taxpayer expense. Since the determination of monetary assessments is based on best professional judgment by Regional Board staff and because professional judgments may differ, ACLs are very likely to be challenged by experts in the field (and therefore may potentially be overturned in court and the ACL returned to the Regional Board for further consideration). Even if the Regional Board successfully defends an ACL in court, considerable public funds and resources will need to be expended by the Regional Boards to defend themselves in a time of limited state budgets. Application of this approach will not serve the public interest or result in additional compliance assurance. Therefore, the Districts recommend that the Draft Policy not specify a limitation on the amount of an ACL that may go to one or more SEPs, and that the Draft Policy leave decisions about specific instances up to the discretion of Regional Boards. Obviously, no Regional Board will be obligated to allow a SEP to be 100% of a given ACL amount, and the determination of the appropriate amount will be made on a case-by-case basis. This approach will provide entities against whom a complaint is filed with a substantial incentive to settle an ACL.

*Part B. General SEP Qualification Criteria*

One change proposed in the Draft Policy SEP provisions is that public awareness and education projects would no longer be eligible as SEP projects. The Districts believe that these projects can be very important in addressing water quality issues, particularly nonpoint source, stormwater, and other types of issues in which the public plays a major role (e.g. learning about proper management of household hazardous wastes and fats, oil and grease (FOG)). Allowing SEPs for public education, outreach and/or awareness projects is also consistent with the State Water Board's proposed Strategic Plan, which sets forth a "Principle and Value" related to Education/Outreach as a guiding principle for the Water Boards over the next 5 years. For all of these reasons, the Districts recommend that this category be added back to the list of categories allowed for SEPs.

*Part D. Nexus Criteria*

The definition of the requisite nexus between a SEP and a violation is overly narrow. The Draft Policy would define a nexus to exist only if "the project remediates or reduces the probable overall environmental or public health risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future." The way in which the nexus requirement is expressed in this particular sentence may make it difficult or impossible to use SEPs in many circumstances, since the Draft Policy also very clearly specifies that "a SEP should only consist of measures that go above and beyond the otherwise applicable obligations of the discharger." It seems that it will be difficult to identify SEPs that could actually be done that are above and beyond regulatory obligations (and over and above the discharger's obligation for cleanup and mitigation, for instance, in the event of a sanitary sewer overflow), yet will actually remediate or reduce the probable environmental or public health risks to which the violation at issue contributes. Therefore, the Districts recommend that this section of the Draft Policy simply specify that a project must have a geographic, category, or beneficial use nexus.

## 2. Proposed Economic Benefit Provisions (Section VII, Parts E and J)

Section VII (Monetary Assessments in Administrative Civil Liabilities, Part J, Statutory Maximum Limits) of the Draft Policy states that "It is the policy of the State Water Board that all ACLs that are not MMPs should be assessed at a level that at a minimum recovers the economic benefit." Determination of economic benefit is an important element of the determination of ACL amounts but, due to the considerable uncertainty inherent in its calculation, particularly in the case of economic benefit realized by a public agency, the Districts request that the State Board modify the Draft Policy to allow flexibility in its use. This requirement that all ACLs recover the economic benefit is also overly broad in its application to all ACLs that are not MMPs. The requirement to capture economic benefit should be limited to enforcement actions undertaken pursuant to Water Code section 13385 (NPDES), not Water Code sections 13323-13351 (WDRs). Unlike Water Code section 13385(e), Water Code sections 13327 and 13351 state that economic benefit is simply a factor for consideration when calculating the appropriate penalty, not a mandated minimum amount to collect.

*Part E. Economic Benefit to Discharger from Noncompliance.*

First, the calculation of any economic benefit value is subject to substantial variability. Regional Board staff who attempt to calculate economic benefit must make a number of assumptions relative to the time when action (i.e., additional treatment or other activity) "should" have been implemented and the cost to implement such action. Varying these assumptions only slightly, by a few years or 10% of costs as examples, can significantly affect the calculated economic benefit, and thus, the minimum fine amount. For this reason, flexibility in interpretation and implementation of economic benefit in ACLs ought to be encouraged, rather than prohibited.

Second, in many cases, the permittee actually incurs a *negative* economic benefit when the construction of facilities needed for compliance are commenced at a later date, for a number of reasons, in

a different economic climate (higher construction or interest costs). A negative economic benefit can also occur in the case of a facility retrofit where the cost to construct necessary pollution control facilities is actually higher after the fact due to the physical restrictions of the already constructed plant. Thus, no economic benefit may be realized; however, current methodologies for calculating economic benefit under the Draft Policy do not provide for consideration of such a situation.

Third, the premise of economic benefit rests on the assumption that a permittee did not exercise "due care" and failed to take appropriate measures at the appropriate time to prevent violations. The determination of what constitutes "due care" is completely subjective. For example, a permittee may have in good faith pursued options other than those the Regional Board staff selects for purposes of calculating economic benefit. The permittee may have had valid engineering or other reasons for selecting another compliance option. It is unfair to have the Regional Boards engage in a process of "second-guessing" the actions of permittees after the fact, when the Regional Boards are precluded by statute from specifying the manner of compliance with water quality orders. At a minimum, it would be appropriate to include in the calculation of economic benefit an "offset" for the measures the permittee did undertake. Because of the difficulties of equitably and appropriately determining economic benefit, it will be difficult to realize the SWRCB's goals of "fair, firm, and consistent" enforcement while stipulating a minimum fine amount based on the calculation of the amount of economic benefit the permittee may have "gained."

Fourth, when considering recovery of economic benefit, and its calculation using the US EPA's BEN model, the Draft Policy does not consider the differences between dischargers who are public agencies and dischargers who are private entities. The BEN model, which the Districts have questioned the validity of at least in some applications, appears to be geared toward private entities, and not public agencies, as evidenced by the introductory paragraphs which accompany the BEN model under the section "Context and Theory of Economic Benefit," which state that "other regulated **companies** may see an economic advantage in similar noncompliance" if full economic benefit is not collected by the enforcement agency. More importantly, the concept of financial gain is not directly applicable to public agencies. Public agency permittees fund their capital and operating expenses primarily on ratepayer fees that must comply with a variety of complex laws to protect the ratepayer from being overcharged. For instance, POTW fees are set commensurate with the costs of constructing and operating facilities and are collected at a rate to ensure compliance is obtained. If the public agency permittee is determined to have "avoided" additional costs of compliance, the public agency has not "profited," since the collection of fees from ratepayers would simply reflect existing costs. Lower fees paid by ratepayers in the past do not correspond to the type of economic benefit calculated using the BEN model, which uses a "cost of money approach." Thus, the Districts question how application of the concept of "financial gains that a violator accrues" can be applied to a public agency that does not generate a profit and, therefore, is not directing funds it would otherwise spend on compliance into profitable investments.

For these reasons, the Districts believe that in the case of public agencies, the BEN model should not be used to set a minimum penalty level.

### 3. Determining the "Priority" of Violations (Section III)

Section III.A, "Class I Priority Violations," of the Draft Policy specifies that Class I Priority Violations include, "violations that result in, or present a substantial risk of, causing acute or chronic toxicity to fish or wildlife or a threat to public health." While the Districts concur that violations resulting in significant harm to fish or wildlife should be a high priority for enforcement efforts, we are concerned that this provision of the Draft Policy could be interpreted to mean that any violation of a limitation or trigger associated with chronic whole effluent toxicity (WET) testing will be considered a Class I Priority

<sup>1</sup> US EPA BEN Model Introduction, US EPA 1999

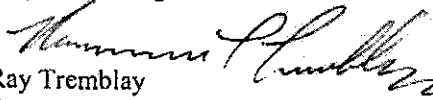
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Violation. Such an interpretation would be troublesome, in particular for chronic toxicity, due to a high rate of false positives inherent in testing procedures and the resulting lack of nexus between chronic toxicity detection at low levels and actual receiving water impacts. We recommend that the Draft Policy be amended to state that a violation of WET limitation only be considered a Class I Priority Violation when actual toxicity or beneficial use impacts are observed in the receiving waters and there is evidence (such as WET testing results) linking a discharge to the observed impacts. Indeed, exceedance of a toxicity trigger or WET limit without additional information indicating likely receiving water impacts should not be considered a Class I Priority Violation.

Instead, in evaluating the appropriate priority level for WET limit violations, it is more appropriate and reasonable to determine if permittees have investigated potential sources of toxicity and tried to identify the specific constituent(s) responsible, in accordance with permit conditions. Because toxicity is a characteristic of an effluent or receiving water and not a constituent that can be regulated by measuring its concentrations, to effectively control toxicity, it is necessary to identify the causative agent. The Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (SIP) adopted a regulatory strategy that relies on chronic toxicity testing to drive action to identify and mitigate the source(s) of toxicity. The SIP requires that discharge permits include a requirement to conduct a toxicity reduction evaluation (TRE) if repeated tests reveal toxicity as a result of waste discharge. It further requires that discharge permits include a provision requiring permittees to take all reasonable steps to control toxicity once the source of toxicity has been identified. Accordingly, the existing Enforcement Policy contains provisions (*see p. 10*) stating that violations of numeric WET limits are not priority violations when the associated waste discharge requirements contain a requirement to investigate the cause of the violation (specifically the implementation of a toxicity identification/TRE), the facility is in compliance with this requirement, and the facility takes necessary action to ensure that it does not cause or contribute to future violations of WET limits. The Districts recommend that these provisions be retained in the revised Policy.

In conclusion, while the Districts concur with many of the State Water Board's goals and principles in preparing the Draft Policy, we strongly recommend that changes be made to the sections relating to SEPs, recovery of economic benefit, and determination of the priority of violations related to whole effluent toxicity testing. The Districts also support the comments and recommendations being submitted jointly by the California Association of Sanitation Agencies, Tri-TAC and a number of other wastewater organizations on the Draft Policy. Thank you for the opportunity to comment on this important state policy.

Yours very truly,  
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Monitoring Section

RT:lmb

cc: Reed Sato, Director, Office of Enforcement